

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

HVAC CORP., INC.¹

Employer

and

Case 4–RC–20338

SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION, LOCAL NO. 19, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

¹ The name of the Employer appears as amended at the hearing.

5. The Employer is engaged in the sale and service of heating and air conditioning (HVAC) equipment.² More than 90 percent of the Employer's work is residential, and the remainder is commercial. The Petitioner seeks a unit of all full-time and regular part-time HVAC installation employees, including mechanics and helpers.³ The Employer takes the position that the only appropriate unit would include both installation employees and service technicians.⁴ The parties disagree as to the inclusion of Donald Brennan, Robert Harris and Yoram Bendell in the unit. The Petitioner asserts that installation helper Donald Brennan should be included in the unit, while the Employer contends that he was terminated in June 2001.⁵ The Employer takes the position that Robert Harris and Yoram Bendell are service technicians who should be included in the unit, while the Petitioner contends that, even if service technicians are included in the unit, Harris and Bendell should be excluded because they are primarily sales employees.⁶ Finally, the Petitioner contends, contrary to the Employer, that the Employer is in the construction industry and that the *Daniels/Steiny* formula should govern employee voting eligibility.⁷

Steven Fox is the Employer's President and co-owns the company with Yishai Kedar. Jerry Fox is the Employer's Office Manager.⁸ The Employer's work force is divided into a service group and an installation group. Steven Fox testified that he was uncertain as to the relative amounts of the Employer's service and installation work. Fox also testified that while he had "no idea" what percentage of the Employer's income is derived from service work and was unable to estimate whether it was more than half of the total income, he also testified that the majority of the Employer's revenues come from service work. The Employer does not maintain financial records categorizing work as service or installation, and its records are inadequate to determine the accuracy of Fox's testimony on this point.

The installation employees are responsible for removing existing HVAC systems and installing new ones. They also install necessary ductwork, electrical wiring and controls and perform related plumbing work. The service technicians perform repairs to existing heating and air conditioning systems. If the system is not repairable or the repairs would be too expensive, the service employee may recommend that the customer purchase a new unit. The service employees also spend about 10 to 15 percent of their time making sales calls in an effort to sell HVAC units where there is no repair involved. Steven Fox testified that Harris, Bendell, Weisenberger, and Weidel all perform the same work.

² The Employer operates under the trade names "Eastern Heating and Air Conditioning" and "United Heating and Cooling."

³ The parties agree that Robert Hartman, Robert Conrad and Ronald Brennan are installation mechanics, Robert Gonzales and Ed Lowell are installation helpers, and Chris Weidel and Albert Weisenberger are service technicians.

⁴ The Petitioner originally sought a unit of installation and service employees, but at the hearing the Petitioner amended the petition to exclude the service employees. The Petitioner has indicated that it would proceed to an election in any unit found appropriate.

⁵ All dates are in 2001 unless otherwise indicated.

⁶ In its brief, however, the Petitioner did not renew this contention and referred to Harris and Bendell as service technicians. As the Petitioner did not withdraw the contention, it will be considered in this Decision.

⁷ *Daniel Construction*, 133 NLRB 264(1961), modified in 167 NLRB 1078 (1967); *Steiny & Co.*, 308 NLRB 1323 (1992).

⁸ Jerry Fox is Steven Fox's father, and the parties stipulated that he is a supervisor.

Co-owners Fox and Kedar hire and fire all employees, assign their work, and determine their pay. Each morning, all employees report either to the Employer's facility or directly to their work sites. Office Manager Jerry Fox informs them of their work assignments. Installation employees generally perform all of the Employer's installation work and are not asked to perform service work, and service technicians generally do not perform installation work.⁹ However, an installation employee may accompany a service employee on a call to explain how the unit was installed and wired. Steven Fox testified that the installers work with service employees about 20 to 30 percent of the time. However, he also testified that service and installation employees are entirely separate and never assist each other. The Employer did not produce records in support of Fox's assertion that they work together 20 to 30 percent of the time. Installation mechanic Ronald Brennan testified that he only works with service employees about five percent of the time. He stated that he has not worked with service employees at all for several months, but during the summer he worked with service technician Weisenberger on some weekends. According to Ronald Brennan, he has never done any service work. Additionally, service technician Harris testified that he generally works alone but occasionally works with another service employee. He did not indicate that he ever works with installation employees. Installation helper Ed Lowell has worked for the Employer as both an installation employee and a service employee, but the Employer had only employed him for a week and a half as of the hearing.

No current service technicians have previously worked for the Employer as installation employees, and no current installation employees have worked for the Employer as service technicians; the last such transfer between these groups occurred more than a year ago. Both groups use pipe wrenches, nut drivers, wire cutters and screwdrivers. Service employees also use voltage meters and gauges to test for Freon, while installation employees also use metal cutting tools. Installation employees may hire helpers to assist them, and they pay these helpers themselves. None of the Employer's employees receive formalized training, and they are not required to have any educational degrees or certifications. The employees in both groups have no set work hours; their hours are determined by the requirements of each job and the availability of the customers.

The Employer's compensation policies are subject to individual negotiation, and methods of compensation vary considerably among the employees. The Employer gives its service technicians the option of receiving an hourly wage rate and a commission on sales or being paid solely on a commission basis. Bendell and Harris have elected to be paid solely by commission. Harris receives a 25 percent commission for all service work and a 15 percent commission on sales of new units. Bendell receives a 30 percent commission on service work and a 10 percent commission on sales. Service technicians Weidel and Weisenberger are paid an hourly wage plus commissions. Weisenberger receives \$10 per hour plus a \$50 commission per job. Weidel earns \$15 per hour, but the record does not indicate the amount of his commission. Installation mechanics Hartman and Ronald Brennan are paid a negotiated price for each job, while installation mechanic Conrad earns \$15 per hour.¹⁰ Installation helpers Lowell and Gonzales are paid \$12 and \$10 per hour, respectively. Service technician Harris testified that he earned about

⁹ Service technician Harris testified that he does not perform any installation work.

¹⁰ Conrad has only been employed by the Employer for about two months.

\$60,000 in the past year; the record does not indicate the other employees' annual earnings.¹¹ All employees are paid on a weekly basis except for service technician Bendell, who is paid monthly. The Employer may provide higher compensation to an employee if he uses his own vehicle rather than the Employer's vehicle. Only Harris and service technician Weidel receive vacation pay, and Harris, Weidel and Bendell are the only employees who receive year-end bonuses. Weidel is the only employee paid through a payroll service and covered by unemployment and workers compensation insurance, and he is also the only employee who receives pension and health care benefits and paid holidays. About six employees are provided with a company cell phone for a limited number of minutes each month. Some employees punch a time clock, while others record their hours on time sheets.

Harris testified that about 75 percent of his work is service work, and the remaining 25 percent of his time is spent on sales. Harris originally chose to be paid on an hourly basis but later chose to be paid by commissions only. Bendell works six days a week. He works an eight-hour day one day a week and three or four hours a day on the remaining days. He spends about 90 percent of his time performing service work and about 10 percent of his time on sales. Fox testified without contradiction that Harris, Bendell, Weidel, and Weisenberger all perform the same work.

In making unit determinations the Board weighs a variety of factors, including differences in employee interests and working conditions, wages and/or other compensation; different hours of work and benefits; separate supervision; degree of dissimilar qualifications, training and skills; differences in job functions; frequency of contact with other employees; work situs of the various classifications; degree of integration or interchange of work between classifications and the history of bargaining; and whether they are part of an integrated operation. *Overnite Transportation Company*, 322 NLRB 723, 724 (1996); *Esco Corp.*, 298 NLRB 837, 839 (1990); *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962). In making these determinations, the Board first considers the union's petition and whether that unit is appropriate. *P.J. Dick Contracting*, 290 NLRB 150 (1988). The petitioner is not compelled to seek any particular appropriate unit. The Board's declared policy is to consider only whether the unit requested is an appropriate one, even though it may not be the optimum or most appropriate unit for collective bargaining. *Black & Decker Mfg. Co.*, 147 NLRB 825, 828 (1964). A union is, therefore, not required to request representation in the most comprehensive or largest unit of employees of an employer unless "an appropriate unit compatible with that requested unit does not exist." *P. Ballantine & Sons*, 141 NLRB 1103, 1107 (1963); accord *Ballentine Packing Co.*, 132 NLRB 923, 925 (1961). See also *Overnite Transportation Company*, supra. If the Board finds that the unit sought by the petitioner is an appropriate unit, its inquiry ends. *Dezcon, Inc.*, 295 NLRB 109, 111 (1989). Accordingly, while a comprehensive unit of all installation and service employees may be an appropriate unit, it is only necessary to decide whether the petitioned-for unit of installation employees is an appropriate one for collective bargaining under the Act. *R.B. Butler, Inc.*, 160 NLRB 1595, 1599 (1966).

¹¹ Steven Fox could only "guess" as to other employees' earnings. He roughly estimated that Weisenberg earned about \$30,000.

The Board has long held that units in the construction industry may be appropriate on the basis of either a craft unit or departmental unit, or so long as the requested employees are a clearly identifiable and homogeneous group with a community of interest separate and apart from other employees. *Brown & Root Braun*, 310 NLRB 632, 635 (1993); *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978); *R.B. Butler Inc.*, supra at 1598-1599 (1966) and cases cited therein. The fact that employees may perform duties outside of their classification does not render their inclusion in the unit inappropriate when these duties are secondary in nature. *Dick Kelchner Excavating Co.*, supra at 1415; *W.P. Butler Company*, 214 NLRB 1039 (1974).

The record shows that the Employer is engaged in the construction industry. Thus, the Employer's work consists of the installation, service and repair of HVAC units, and the Board has held that the service and repair of HVAC systems in existing structures, as well as the installation of new HVAC units, constitutes construction work. *C.I.M. Mechanical Co.*, 275 NLRB 685, 691 (1985).¹² See also *South Alabama Plumbing*, 333 NLRB No. 4, JD slip op. at 7 (2001); *Bay Area Sealers*, 251 NLRB 89 (1980), enfd. in pertinent part, 665 F.2d 970 (9th Cir. 1982); *Painters Local 1247 (Indio Paint and Rug Center)*, 156 NLRB 951 (1966). Moreover, it is likely that a majority of the Employer's business consists of installation work, inasmuch as more of the Employer's employees regularly perform installation work than service work. Accordingly, the *Daniel/Steiny* formula governs the Employer's employees' eligibility.

I find that the petitioned-for unit limited to installation mechanics and helpers is appropriate. The record shows that although they occasionally work together, installation employees regularly perform only installation work, and service technicians regularly perform only service work. Service technicians also have significantly greater involvement in sales of new units. The Employer does not apply common compensation policies to all employees; compensation methods and amounts are negotiated individually with employees in both groups. However, to the extent generalization is possible, installation employees are compensated in a different manner than service technicians. Thus, the installation mechanics and helpers are paid by the job or an hourly basis, while service technicians all are paid, at least in part, by commission. Unlike service technicians, installation employees also have the right to select and hire helpers. Service technicians use some, but not all, of the same tools as installation employees. Employees from both groups report to the same facility in the morning, but then are sent to different jobs, where they generally have no contact with each other. In *Schaus Roofing and Mechanical Contractors, Inc.*, 323 NLRB 781 (1997), the Board found appropriate a unit of sheet metal installation employees, excluding service technicians and pipefitters, despite the employer's contention that the service technicians and pipefitters should be included. The Board adopted the Acting Regional Director's decision, which stated, among other things:

I find that the evidence fails to establish that the service technicians in this case perform an amount of traditional skilled sheet metal craft work sufficient to

¹² In that case, the Board adopted the definition of construction set forth in *Construction Review* Vol. 3 (1957 supplement), published jointly by the U.S. Departments of Commerce and Labor. This definition states, in pertinent part, that, "construction covers the erection, maintenance and repair (including the replacement of integral parts) of immobile structures and utilities, together with service facilities which become integral parts of structures and are essential to their use for any general purpose." The definition specifically included heating and air conditioning systems.

require their inclusion in the craft unit. It appears that service technicians have little work-related contact with sheet metal workers. There is no evidence of the training necessary to perform installation, start-up, and controls work, or of the extent to which the work herein compares to that within the jurisdiction of sheet metal workers in other units. In this case, service technicians spend a substantial proportion of their work time performing some kind of service work apparently distinguished from installation, start-up and controls work . . . Therefore, I find that the service technicians need not be included in the appropriate craft unit of sheet metal workers.” 323 NLRB 781 at 784.¹³

Similarly, in the instant case, the installation employees perform more traditional skilled sheet metal craft work, and the two groups have no regular work-related contact. Additionally, there is no cross-training and no extensive on-the-job contact or interchange between the two groups. Moreover, the installation and service employees are not compensated in a uniform manner. Thus, although there is some common supervision and limited overlap of job functions between installers and service technicians, these factors do not blur the lines of separate craft identity so as to preclude a separate installation employees’ unit. Accordingly, I find that the petitioned-for unit of installation employees is appropriate. *Schaus Roofing*, supra. See also *CCI Construction Co., Inc.*, 326 NLRB 1319 (1998).¹⁴

There is conflicting record evidence as to whether the Employer discharged installation helper Donald Brennan. Donald Brennan has worked for the Employer at various intervals since 1988. In about April 2001, he began to work regularly as a helper to his brother Ronald Brennan. During the period April through June, the Employer sometimes paid Ronald Brennan and Donald Brennan for their work with separate checks and at other times paid them with a single check. Fox testified that some time in June, he and co-owner Kedar decided to terminate Donald Brennan for incompetence and for missing too much work. He testified that he informed both Donald Brennan and Ronald Brennan at that time that Donald Brennan was terminated. According to Fox, the Employer has not issued any paychecks to Donald Brennan since then. Fox further testified that he does not know whether Ronald Brennan has since continued to use his brother as a helper, but concedes that Ronald Brennan could use anyone he chooses in this capacity. Fox also testified that he has seen Donald Brennan four to six times at the Employer’s shop since his “termination.” The Employer did not produce any documentary evidence reflecting Donald Brennan’s “termination.”

Donald and Ronald Brennan both deny that Stephen Fox told them Donald Brennan was terminated. Rather, Ronald Brennan testified that Fox merely expressed concern that Donald Brennan was often absent from work and asked if he wanted additional help. According to both

¹³ In that case, the record showed that service employees performed less-skilled installation work about 17 percent of the time.

¹⁴ Harris and Bendell are excluded from the unit along with the other service technicians. I find, however, that these two employees perform the same work as, and share a community of interest with, the other service technicians, and if service employees were to be included in the unit, Harris and Bendell also should be included. The Petitioner contends that Harris and Bendell are distinct from service technicians because they are compensated solely by commission, but this difference is not of great significance given the very diverse character of the Employer’s compensation system.

Ronald and Donald Brennan, Donald Brennan has continued to work regularly as Ronald Brennan's helper on a Monday to Friday schedule. Indeed, he worked for the Employer up through the weekend prior to the hearing. According to Donald Brennan, Office Manager Jerry Fox regularly sees him in the shop each morning coming to work with Ronald Brennan. Moreover, Jerry Fox has telephoned Donald Brennan's home on several occasions since June to make sure that he will report to work the next day. If Donald Brennan does not report to work, Jerry Fox assigns another employee, generally a service technician, to assist Ronald Brennan, and Ronald Brennan pays that employee directly. The record does not indicate how frequently this occurs. Donald Brennan testified that on one occasion during the summer, he worked as a helper for another installation mechanic and was paid for this work by the Employer.¹⁵ Ronald and Donald Brennan both testified that they received separate paychecks until June, when Ronald Brennan was given a company truck, but since then they have received a single check from the Employer; the Employer gave Donald Brennan a separate paycheck because he used his own truck. Donald Brennan wears shirts to work that were provided by the Employer several years ago.

The Employer has failed to establish that it terminated Donald Brennan. Thus, Donald and Ronald Brennan both contradicted Steven Fox's testimony that he told them that Donald Brennan was terminated, and the Employer has also failed to provide any documentary evidence memorializing the purported discharge. Moreover, the Employer does not dispute that Donald Brennan has continued to work regularly with his brother since his "termination," with Jerry Fox's knowledge, and Steven Fox has seen him at the Employer's shop several times, without raising questions about it. Even if, as the Employer contends, it has not paid Donald Brennan directly for any work since June, this fact would not be dispositive of the issue. In this regard, the Employer often issued a single check to Ronald Brennan for work performed by the two brothers, even prior to June, and the Employer does not contest that it employed Donald Brennan at that time.¹⁶ I therefore find that Donald Brennan continues to be employed as an installation helper and is an eligible voter.

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time sheet metal installation mechanics and helpers employed by the Employer, excluding all other employees, service technicians, office clericals, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

¹⁵ The Petitioner did not provide documentary evidence of this payment.

¹⁶ The Employer stipulated that the employees who are the subject of the petition are employees within the meaning of the Act and are not independent contractors.

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,¹⁷ subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Additionally, eligible are those employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months, or who have had some employment in that period and have been employed for a total of 45 working days within the 24 months immediately preceding the payroll period ending immediately preceding the date of this Decision, and also have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.¹⁸ Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

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LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the **full** names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region Four within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **January 23, 2002**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement of such

¹⁷ Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

¹⁸ *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction*, 133 NLRB 264 (1961), modified in 167 NLRB 1078 (1967).

list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **3 copies**, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall, or by department, etc.). If you have any questions, please contact the Regional Office.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **January 30, 2002**.

Signed: January 16, 2002

at Philadelphia, PA

/s/

DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

440-1760-9167-8200

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